COMIng, and Here to Stay: The Review of the European Insolvency Regulation

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Abstract

In this contribution I summarily review the changes to the European Insolvency Regulation ('EIR'). The new Regulation, 2015/848,[1] will apply to insolvency proceedings opened after 26 June 2017. It repeals Regulation 1346/2000.[2] I will use 'EIR 2015' for the new Regulation and 'former EIR' when I refer to Regulation 1346/2000. In reviewing the changes, I have given readers uninitiated with the Regulation some context to the core provisions and ambitions of the Regulation. However this article is not meant to provide general instruction into the EIR as a whole.[3]

As a preliminary note, the Regulation's official title is a bit of a misnomer. The title of the Regulation is simply 'Regulation [number] on insolvency proceedings'. However the Regulation does not harmonise substantive insolvency law. It is an instrument of private international law, harmonising jurisdictional rules, applicable law and recognition and enforcement of judgments in insolvency matters.

1. Legislative History

1.1 The Development of Regulation 1346/2000

Insolvency proceedings by their nature almost always involve a multitude of stakeholders, and the subject-matter of the multitude of claims is much more varied than in the average private international law scenario.[4]

There are two core approaches to insolvency and private international law. *'Universality'* argues that against one particular insolvent person (whether he is a private individual or an undertaking), only one insolvency procedure ought to be opened.

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[1] OJ [2015] L141/19.

[2] OJ [2000] L160/1.

[3] For more detailed background, see the Insolvency Chapter in G van Calster, *European Private International Law* (2nd ed. Oxford, Hart, 2013); G Moss, IF Fletcher, and S Isaacs (eds.), *The EC Regulation on Insolvency Proceedings* (2nd edition, Oxford, OUP, 2009); B Wessels, *International Insolvency Law* (3rd edition, The Hague, Kluwer, 2012).

[4] For a good illustration see the United Kingdom Supreme Court in *Rubin v. Eurofinance SA* [2012] UKSC 46 (not within the scope of the Insolvency Regulation as none of the debtors had their centre of commercial interest in the EU).

This one procedure would then (have to) include all debts and assets, and decisions reached in its course ought to be recognised by all other jurisdictions. In its purest form, universality combines universality of effects, with unity of proceedings. The often used term 'lex concursus' is more or less uniquely[5] attached to the universality doctrine. It refers to the law of the place where insolvency proceedings have been opened ('*concursus*', as a variety of claims 'concur'), and hints at the standard Gleichlauf between forum and applicable law in insolvency proceedings: the court which has jurisdiction to hear the case, also applies its own laws to the case.

The *territorial approach* to insolvency proceedings focuses on the location of the assets: an insolvency proceeding may /must be opened in each State where the insolvent has assets, and, in its purest form any consequences of such proceeding are limited to the territory concerned: territoriality of effects and plurality of proceedings.

One does not really 'support' one theory or the other. Rather, universality is what one aspires to; territoriality is the interim (potentially ultimate) reality. The universal approach can only work when other States accept the exclusivity of the proceedings in a different State, and are happy to attach consequences to the findings of those proceedings. This requires bi- or multilateral agreements and eventually a global approach to insolvency proceedings.

Insolvency was exempt from the 1968 Brussels Convention,[6] historically the pioneer of European private international law. This was evidently not because it was not deemed to have any relevance to business. Rather it was seen to be of such high relevance to cross-border business, that it required a specific, tailor-made regime. Unlike the majority of issues dealt with in the Brussels Convention (and the subsequent Brussels I Regulation), the subject of insolvency proceedings by its nature almost always involves a multitude of stakeholders, and the subject-matter of the multitude of claims is much more varied than in the average contractual or non-contractual private international law situation.

There have been plenty of attempts to come to a Convention in the insolvency field.[7] In May 1996 one was very nearly there. The entry into force of the 23 November 1995 Convention on insolvency proceedings[8] was made subject to ratification by all fifteen Member States at the time,[9] within a period of 6 months. This period lapsed on 24 May 1996 without the United Kingdom having ratified (due to strategic quarrels over the institutional position of Gibraltar, and the lingering animosity between the UK and the other Member States over the fall-out of the BSE crisis). Having nearly succeeded, it would of course have been foolish not to somehow recycle the 1995

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[5] Grammatically of course there is no reason why 'lex concursus' could not also apply to the territoriality doctrine, however standard terminology is such to reserve it for the universality doctrine.

[6] Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, [1972] OJ L299/32.

[7] See the overview in Moss, G., Fletcher, I.F., and Isaacs, S (eds.), n 3 above, p 2 ff.

[8] It can be downloaded from the Archives of European Integration, e.g. via <http://aei.pitt.edu/2840/>.

[9] Art. 49(3): *'This Convention shall not enter into force until it has been ratified, accepted or approved by all the Member States of the European Union as constituted on the date on which this Convention is closed for signature.*'

text. The 'Insolvency Regulation', Regulation 1346/2000,[10] by default has become a global focal point for attempts to reach a multilateral approach to jurisdiction and applicable law in insolvency proceedings. There is no global or truly multilateral equivalent of the Regulation. Especially given the use of some of the core concepts of the Regulation (first and foremost the 'Centre of Main Interest – COMI, as the main jurisdictional driver) in other jurisdictions, too, their interpretation by courts of the Member States under the guidance of the European Court of Justice, has become of global interest.[11]

Interestingly, given the collapse of the 1995 Convention at the last moment only, it already had all the trimmings of EU private international law Conventions, including the accompanying 'Report', in this case the Virgos-Schmit Report.[12] The Report never having been formally adopted, it has nevertheless considerable influence in the application of the Insolvency Regulation, and is quoted to that effect by the European Court of Justice. This awkwardness is made more poignant by the legal basis of the Regulation. In the five-year interim period post the entry into force of the Treaty of Amsterdam, the Commission did not have sole right of initiative. In this case, given the history of the Regulation, Germany and Finland revived the Convention text more or less as it stood, leading to a lack of Commission proposal (and explanatory Memorandum) and, given the streamlined decision-making procedure, neither any extensive Parliament involvement. The Regulation's travaux préparatoires in other words are thin on the ground, making the Virgos-Schmit Report an important (if unofficial and never formally adopted) reference. The eventual Regulation tries to pre-empt some of the perhaps expected controversy by making full albeit not unusual use of recitals.

The Regulation does not apply to Denmark, which has created one or two peculiar difficulties.

Finally, the Regulation's provisions on applicable law have not been materially changed by the revision and I shall therefore not address them in this contribution. In short, unless otherwise stated by the Regulation, the law of the State of the opening of proceedings is applicable. (This is a case of 'Gleichlauf' between applicable law and jurisdiction). The general rule inevitably had to be adapted for quite a number of instances. In certain cases, the Regulation excludes some rights over assets located abroad from the effects of the insolvency proceedings; in other cases, it ensures that certain effects of the insolvency proceedings are governed not by the law of the State of the opening, but by the law of another State, defined in the abstract. Of particular note are third parties' rights in rem, employment contracts, and 'detrimental acts'.[13]

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[10] OJ [2000] L160/1.

[11] See e.g. A Ragan, *COMI Strikes a Discordant Note* 27 Emory Bankruptcy Developments Journal 117–168 (2010).

[12] Virgos-Schmit Report on the Convention of Insolvency Proceedings. The Report accompanies the Convention, which was never adopted, hence it was not published in the Official Journal. It can be downloaded via the archives of European integration, e.g. via <http://aei.pitt.edu/952>, last consulted 25 July 2015.

[13] On this see Case C-557/13 *Lutz*, ECLI:EU:C:2015:227, and G van Calster, 'Lex causae, securitisation and insulating agreements from the lex concursus. The ECJ in Lutz', <http://www.gavclaw.com>, 24 July 2015, last consulted 28 July 2015.

1.2 The Road to the Changes to the 2000 Regulation.

The EIR 2015 is the result of an entire 'insolvency package', which was adopted by the European Commission ('EC') in December 2012.[14] Article 46 of Regulation 1346/2000 included a now familiar clause instructing the EC to issue a report on the functioning of the Regulation, with, if necessary, a proposal for amendment: the package is the result of this whole exercise. The whole package comprises the proposal to revise Regulation 1346/2000,[15] the Hess /Oberhammer /Pfeiffer /Pieckenbrock / Seagon Report on the application of that Regulation,[16] the Commission Report on same,[17] an Impact Assessment[18] and a Communication on a new European approach on business failure and insolvency.[19] That latter Communication was later supplemented with a Recommendation,[20] in which the Commission again observed the lack of harmonisation at the applicable, and substantive law level. The Recommendation includes among others guidelines on the facilitation of negotiations for business restructuring.

12 years is not necessarily sufficient truly to assess the strengths and weaknesses of any piece of regulation. However it was clear that there were some cracks which showed in the practical roll-out of the Regulation's provisions, particularly in the light of the rather dramatic economic rollercoaster in which the Regulation functioned from 2000 onwards. The five points which the Commission itself identified as core to the reform,[21] would indeed seem to correspond to what practice perceived as being areas of concern. Firstly, the scope. The former Regulation, in particular through its abstract definitions, confined the workings of the regime to terminal, bankruptcy proceedings only. The current Regulation encompasses a much wider range of hybrid and pre-insolvency proceedings. Next, the jurisdictional rules are tidied up, in particular by inserting a properly defined concept of 'COMI'. Further, secondary proceedings are no longer left to their own devices. The new Regulation tightens co-operation between main and secondary proceedings; leaves more discretion to courts whether or not to open secondary proceedings, and gets rid off the requirement that secondary proceedings always be winding-up proceedings. Publicity of various legal actions relating to insolvency is much improved and organised at the European level. And finally, a

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[14] 'Giving honest businesses a second chance: Commission proposes modern insolvency rules', IP/12/1354, 12 December 2015, available via <http://europa.eu/rapid/press-release_IP-12-1354_en.htm> or <ow.ly/Q1x1H>, last consulted 24 July 2015.

[15] COM (2012) 744.

[16] B. Hess, P Oberhammer, T Pfeiffer, A Pieckenbrock, C Seagon, *External Evaluation of Regulation 1346/2000 on Insolvency Proceedings*, December 2012, available at <http://ec.europa.eu/justice/civil/files/evaluation_insolvency_en.pdf> or <ow.ly/Q1ymC>, last consulted 24 July 2015.

[17] COM(2012) 743.

[18] SWD (2012) 416, available via <http://ec.europa.eu/justice/civil/files/insolvency-ia_en.pdf> or <ow.ly/Q1zUT>, last consulted 24 July 2015.

[19] COM (2012) 742.

[20] Commission Recommendation of 12 March 2014 on a new approach to business failure and insolvency, C(2014) 1500.

[21] Note 14 above.

considerable set of rules are introduced to facilitate the proper co-ordination of insolvency proceedings relating to groups of companies.

A first observation when comparing the old and new version of the EIR is that the Regulation, and its recitals, have almost doubled in size. That is in some measure due to the introduction of an entirely new chapter for group insolvency.

2. Scope: The Definition of Insolvency Proceedings

Article 1(1) of the former EIR provided that:

> '*This Regulation shall apply to collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator.*'

It then defined most of these concepts in turn in Article 2. The combined application of these Articles with the associated Annexes meant that the Member States furnished the scope of application of the Regulation by virtue of their inclusion, or not, relevant procedures in Annex. It was not sufficient that national proceedings met the conditions of Article 1 in a generic way, for them to be included in the scope of application of the Regulation. The Virgos-Schmit Report was clear on this point.[22] In *Bank Handlowy*[23] the ECJ moreover confirmed that when a procedure is included in the Annex, upon proposal by the Member State, the EU or indeed the courts in other Member States are not to second-guess whether these are 'true' insolvency proceedings. 'Insolvency' may be a substantial condition for the Regulation to apply, however it is not defined by it.

Under the former EIR, Member States in practice could make reorganisation etc., outside the formal bankruptcy context subject to the EIR by virtue of including the relevant procedure in Annex. Therefore in reality, a Member State arguably need not have waited until the amendment of the Regulation, to ensure that its re-organisation procedures were caught by the regime. (If that is what it wanted. As I review below, sometimes it is more interesting *not* to have reorganisation be caught by the EIR).

The EIR 2015 confirms the wider approach beyond doubt, in line with the EC's objectives as highlighted above. The core definition of insolvency proceeding, previously spread over Article 1 and 2, has been somewhat better integrated although it is still spread over Articles 1 and 2. It now reads:

> '*This Regulation shall apply to public collective proceedings, including interim proceedings, which are based on laws relating to insolvency and in which, for the purpose of rescue, adjustment of debt, reorganisation or liquidation:*

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[22] Virgos-Schmit Report, para. 48, p 32.

[23] Case C-116/11 *Bank Handlowy w Warszawie SA and PPHU «ADAX»/Ryszard Adamiak v. Christianapol sp. z o.o.*., ECLI:EU:C:2012:739.

(a) a debtor is totally or partially divested of its assets and an insolvency practitioner is appointed;
(b) the assets and affairs of a debtor are subject to control or supervision by a court; or
(c) temporary stay of individual enforcement proceedings is granted by a court or by operation of law, in order to allow for negotiations between the debtor and its creditors, provided that the proceedings in which the stay is granted provide for suitable measures to protect the general body of creditors, and, where no agreement is reached, are preliminary to one of the proceedings referred to in point (a) or (b).

Where the proceedings referred to in this paragraph may be commenced in situations where there is only a likelihood of insolvency, their purpose shall be to avoid the debtor's insolvency or the cessation of the debtor's business activities. The proceedings referred to in this paragraph are listed in Annex A.'

The EIR 2015 emphasises its wider calling (not just liquidation but also reorganisation) by dropping the term 'liquidator' in favour of 'insolvency practitioner'.

Some, but certainly not all, Member States have included a variety of restructuring mechanisms in their relevant Annexes. Recital 9 is very clear as to the fate of procedures in- or excluded from the Annexes:

'*This Regulation should apply to insolvency proceedings which meet the conditions set out in it, irrespective of whether the debtor is a natural person or a legal person, a trader or an individual. Those insolvency proceedings are listed exhaustively in Annex A. In respect of the national procedures contained in Annex A, this Regulation should apply without any further examination by the courts of another Member State as to whether the conditions set out in this Regulation are met. National insolvency procedures not listed in Annex A should not be covered by this Regulation.*'

Recital 9, combined with the definition of insolvency proceeding referred to above, represents an important boost to regulatory competition in the restructuring area. Ad nauseam, the Annex is the trigger and it is the Member States that pull it. In my view that renders nugatory many of the discussions which one could conceivably have vis-à-vis the terminology of the EIR. For instance, in the absence of European harmonisation of substantive insolvency law, what laws are '*laws relating to insolvency*' must be left to the Member States. Any autonomous interpretation of the concept by the CJEU in my view would run counter the clear deference to national law expressed in the Annex system.

One of the elephants in the room are the English Schemes of Arrangement. These have gained considerable popularity for use by companies not registered in the UK, the most obvious attraction being the possibility of 'cram down' under the relevant English law (Part 26 of the Companies act 2006 (England and Wales). A Scheme of Arrangement allows a (qualified) majority of creditors to accept restructuring of the

company's debt in spite of opposition by a minority, *and* to have that restructuring have binding effect on those unwilling creditors. Relevant case-law[24] leaves the Schemes firmly outside of the EIR and within the scope of application of the Brussels I Regulation.[25] That Regulation facilitates jurisdiction of the English courts, in contrast with the EIR where jurisdiction is based on objective elements. Schemes of arrangement have had an important impact on the attraction of London as a basis for restructuring practice, arguably also leading continental European States to amend their insolvency laws in relevant parts.[26] The Annex approach of the Regulation in my view would have sufficed to emphasise the exclusion of Schemes of Arrangement from the EIR. So as to leave no doubt, however, the UK succeeded in having a specific recital inserted to emphasise the point: recital 16:

This Regulation should apply to proceedings which are based on laws relating to insolvency. However, proceedings that are based on general company law not designed exclusively for insolvency situations should not be considered to be based on laws relating to insolvency. (…)

3. Relation with the Judgments Regulation (Brussels I Recast): To Dovetail or Not?

Recital 7 addresses the relation between the Brussels I Recast Regulation 1215/2012,[27] and the Insolvency Regulation:

> *'Bankruptcy, proceedings relating the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings and actions related to such proceedings are excluded from the scope of Regulation (EU) No 1215/2012 of the European Parliament and of the Council. Those proceedings should be covered by this Regulation. The interpretation of this Regulation should as much as possible avoid regulatory loopholes between the two instruments. However, the mere fact that a national procedure is not listed in Annex A to this Regulation should not imply that it is covered by Regulation (EU) No 1215/2012.'*

Insolvency, as noted above, was excluded from the Judgments Regulation, Brussels I, (and from the 1968 Brussels Convention[28] before it) because it was envisaged to be included in what eventually became the Insolvency Regulation. Consequently the

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[24] See in particular *Apcoa*, [2014] EWHC 3849, and *Van Gansewinkel*, [2015] EWHC 2151.

[25] Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ [2001] L12/1, and the Recast regulation 1215/2012, OJ [2012] L351/1.

[26] See in Germany, the 2012 *Gesetz zur weiteren Erleichterung der Sanierung von Unternehmen*; In The Netherlands, currently in ist finalisation stages, the Govenrment program for the recalibration of insolvency law (*Programma HerijkingFaillissementsrecht*).

[27] OJ [2012] L351/1.

[28] Note 6 above.

scope of application of the Judgments Regulation and the Insolvency Regulation evidently is determined by each other's existence.

However whether they clearly 'dovetail' (i.e. slot into one another leaving no spare space; rather like the joint from which the expression takes its name) when it comes to their respective scope of application, is less clear.[29]

Nickel and Goeldner at para. 21,[30] and *Nortel Networks* at para. 26,[31] are often quoted in support of the dovetail. However Recital 7 usefully reminds us not to treat *ex*clusion of Annex A EIR as automatically leading to *in*clusion in Brussels I recast. I do not in fact think the Report Jenard[32] suggests that the Brussels Convention intended a pure parallel.[33] That Report merely mentions the (never completed) Insolvency Convention being prepared and the need to pace the inclusion of bankruptcy etc., in European private international law. Rather it is the Schlosser Report which first in so many words suggests the need for dovetailing:[34] (footnotes omitted)

> '*leaving aside special bankruptcy rules for very special types of business undertakings, the two Conventions were intended to dovetail almost completely with each other. Consequently, the preliminary draft Convention on bankruptcy, which was first drawn up in 1970, submitted in an amended form in 1975, deliberately adopted the principal terms 'bankruptcy compositions' and 'analogous proceedings in the provisions concerning its scope in the same way as they were used in the 1968 Convention.*'

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[29] At any rate any dovetailing does not extend to matters of choice of law. That is because neither Lugano nor the Judgments Regulation consider choice of law: they are limited to jurisdiction. See Snowden J in *re Van Gansewinkel*, n 24 above.

[30] Case C-157/13 *Nickel & Goeldner Spedition GmbH v. Kintra UAB*, ECLI:EU:C:2014:2145, para. 21: '*In this respect, it should be noted that, relying inter alia on the preparatory documents relating to the [Brussels Convention], which was replaced by Regulation No 44/2001, the Court has held that that regulation and Regulation No1346/2000 must be interpreted in such a way as to avoid any overlap between the rules of law that those texts lay down and any legal vacuum. Accordingly, actions excluded, under Art. 1(2)(b) of Regulation No 44/2001, from the application of that regulation in so far as they come under 'bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings' fall within the scope of Regulation No 1346/2000. Following the same reasoning, actions which fall outside the scope of Article 3(1) of Regulation No 1346/2000 fall within the scope of Regulation No 44/2001 (judgment in F-Tex, C-213/10, EU:C:2012:215, paragraphs 21, 29 and 48).*'

[31] Case C-649/13, *Comité d'entreprise de Nortel Networks SA and others v. Cosme Rogeau* et al., ECLI:EU:C:2015:384, at 26, quoting quasi verbatim from *Nickel & Goeldner*, n 30 above.

[32] Report by P Jenard on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, OJ [1979] C59/1.

[33] As suggested by A Layton, and H Mercer (General eds.), with H Mercer, L Wyles, C Dougherty and P de Verneuil Smith (ass.eds.), and S O'Malley (consultant ed.), *European Civil Practice*, 356–357 (2nd ed., Vol.1, London, Sweet & Maxwell, 2004), referring to the Report Jenard.

[34] Report by P Schlosser on the convention on the Association of the Kingdom of Denmark, Ireland and the United Kingdom to the convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice, OJ [1979] C59(71) 90.

In *German Graphics* however the CJEU itself notes that *'it is conceivable that, among those judgments, there are some judgments which will come within the scope of application neither of Regulation No 1346/2000 nor of Regulation No 44/2001.*'[35]

Whatever the intention of the Brussels Convention, the way in which the EIR (old and new) has defined its scope of application, has arguably upset any dovetailing that might have been intended. The eventual text of the former and 2015 EIR, and additionally the relevance of inclusion in the Annex, clearly show that the absolute parallel cannot be maintained in practice. Starting with the definition, the Jenard Report employs a definition which certainly does not entirely overlap with the definition in either former or new EIR:

> '*Article 1 (2) excludes bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons judicial arrangements compositions and analogous proceedings,* i.e. *those proceedings which depending on the system of law involved, are based on the suspension of payments, the Insolvency of the debtor or his inability to raise credit, and which involve the judicial authorities for the purpose either compulsory and collective liquidation of the assets or simply of supervision.*'[36]

Further and as noted, neither Report Jenard, Schlosser or the Brussels Convention itself would have envisaged the Member States being in the definitional driver's seat, as a result of the Annex approach as reviewed above.

4. Determination of COMI and 'Look Back' Periods

4.1 The Guiding Principles following from the Former EIR

A core jurisdictional trigger in the EIR is the debtor's 'Centre of Main Interests' or 'COMI'. 'Main proceedings' can only be opened by a court in the Member State of COMI. Those proceedings comprise all assets of the debtor, wherever located (in- or outside of the EU). COMI however was not defined in the former EIR. It was recital 13 which furnished the definition:

> *The "centre of main interests" should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties.*

Both elements had to be present simultaneously. Ascertainability by third parties in particular is a core safeguard. It is crucial for such parties' confidence especially in

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[35] Case C-292/08 *German Graphics Graphische Maschinen GmbH* v. *Alice van der Schee*, [2009] ECR I-8421, at 17.

[36] Note 32 above, 11 in fine-12.

dealing with business partners with whom they have done none of very little business before. The Virgos-Schmit report clarified:[37]

– The use of the term "interests", was intended to show that not only commercial, industrial or professional activities are caught by the Regulation, but also general economic activities. This therefore includes the activities of private individuals (e.g. consumers).
– The expression "main" serves as a criterion for the cases where these interests include activities of different types which are run from different centres.

In principle, the centre of main interests will in the case of professionals be the place of their professional domicile and for natural persons in general, the place of their habitual residence. ('Habitual residence' is not actually employed as a criterion in the former EIR).

Where companies and legal persons are concerned, the former EIR in Article 3(1) presumed, unless proved to the contrary, that the debtor's centre of main interests is the 'place of the registered office'. The Virgos-Schmit Report adds that this place normally corresponds to the debtor's 'head office', however this is a concept which in itself is open to a great many interpretations. In practice, national courts have been quite happy to set aside the presumption (as Article 3(1) specifically allows them to), giving it arguably a lot less weight than perhaps had been assumed by the drafters of the Regulation.[38] The CJEU itself had singled out mailbox companies as not being in a position simply to claim the protection of the State in which they are incorporated:

> *'in determining the centre of the main interests of a debtor company, the simple presumption laid down by the Community legislature in favour of the registered office of that company can be rebutted only if factors which are both objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which locating it at that registered office is deemed to reflect. That could be so in particular in the case of a 'letterbox' company not carrying out any business in the territory of the Member State in which its registered office is situated.'*[39]

CJEU and national case-law led to the following main principles on the interpretation of COMI:

– A need for autonomous interpretation, in line with the general approach of the European court in the application of European private international law;
– The importance of the objectivity of the test and the ascertainability by third parties /(potential) creditors.

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[37] Note 12 above, para. 75, p 51 ff.

[38] P Wautelet,*Some Considerations on the Center of Main Interests as Jurisdictional Test under the European Insolvency Regulation*, in G Affaki (ed), *Cross-border Insolvency and Conflicts of Jurisdictions: A US-EU Experience*,73, 86ff (Brussels, Bruylant, 2007).

[39] Case C-341/04 *Eurofood IFSC* [2006] ECR I-3813, para. 34–35.

– The individuality of COMI in the case of groups of companies. The Regulation itself contains no specific rules on determining COMI for groups of companies, neither did the draft Convention.[40] Each debtor constituting a distinct legal entity is subject to its own COMI determination.[41] The mere fact that a daughter company's economic choices are or can be controlled by a parent company in another Member State is not enough to rebut the presumption laid down by Article 3(1) of the Regulation.[42]

4.2 The Provisions of the EIR 2015

COMI is now defined in the EIR proper: Article 3(1): *'(...)The centre of main interests shall be the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties.*'

The EIR 2015 has expanded and clarified the presumptions of COMI and has also provided a qualified look-back period for change of COMI. Both corporations and individuals can and do of course legitimately move their COMI. However one of the main drivers of the Regulation is to avoid abusive forum shopping, whereby debtors move COMI simply to shop for a regime which will be attractive to them but not to their creditors.

To assist genuine change in COMI, Recital 28 emphasises, in line with the main principles recalled above, the relevance of ascertainability by third parties also in the event of a shift in COMI. It adds a number of practical precautions which the debtor could take to ensure that an intended shift in COMI actually will be recognised as such:

> '*This may require, in the event of a shift of centre of main interests, informing creditors of the new location from which the debtor is carrying out its activities in due course, for example by drawing attention to the change of address in commercial correspondence, or by making the new location public through other appropriate means.*'

More generally, the EIR 2015 has expanded COMI presumptions as follows: Article 3(1):

> *The courts of the Member State within the territory of which the centre of the debtor's main interests is situated shall have jurisdiction to open insolvency proceedings ('main insolvency proceedings'). The centre of main interests shall*

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[40] Virgos-Schmit Report, para. 76, p 52.

[41] See the opposite view, prior to the *Eurofood* judgment, *In re Collins & Aikman Corp. Group*, [2005] EWHC 1754 (Ch), in which the High Court addressed COMI vis-a-vis Michigan-based company with twenty-four corporations registered in the EU. The group was treated as a single unit.

[42] Note 39 above, para. 30 ff.

be the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties.

In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary. That presumption shall only apply if the registered office has not been moved to another Member State within the 3-month period prior to the request for the opening of insolvency proceedings.

In the case of an individual exercising an independent business or professional activity, the centre of main interests shall be presumed to be that individual's principal place of business in the absence of proof to the contrary. That presumption shall only apply if the individual's principal place of business has not been moved to another Member State within the 3-month period prior to the request for the opening of insolvency proceedings.

In the case of any other individual, the centre of main interests shall be presumed to be the place of the individual's habitual residence in the absence of proof to the contrary. This presumption shall only apply if the habitual residence has not been moved to another Member State within the 6-month period prior to the request for the opening of insolvency proceedings.

Rather than just the one presumption in the former EIR for companies or legal persons, the EIR 2015 introduces presumptions of COMI for all three categories of insolvable persons. For neither of the three categories does the Regulation introduce a negation of move of COMI within a prescribed period. Rather, it introduces look-back periods (3 months for corporations and individuals exercising an independent business or professional activity; six months for individuals not carrying out such activity) in which the presumption will no longer hold. Change of COMI in that period immediately preceding a filing for insolvency can still be substantiated however then purely following the COMI criteria of Article 3(1), recalled above.

5. The Insolvency of Groups of Companies and 'Group Coordination Proceedings'

5.1 The Entity-by-Entity Approach is Maintained

In *Eurofood*,[43] as noted, the Court of Justice insisted on determination of COMI for each separate undertaking. The CJEU therefore defers to the corporate veil and in my view is right to do so. Of note is of course that the finding in *Eurofood* does not exclude that COMI for highly integrated groups of companies may be found to be in one and the same place. Ad hoc rebuttal of the registered office presumption in favour of the registered office of the holding company, is most definitely a possibility.

[43] Note 39 above.

The EC did not in principle question the what it calls 'entity-by-entity' approach for determining COMI. Instead, it proposed better co-ordination between the insolvency proceedings, using in particular procedural safeguards to enable liquidators of the various companies of the group to have a say in each other's procedure. The European Parliament strengthened the co-ordination element by inserting 'group coordination proceedings', which we further review below.

The Regulation (Article 2(13)) defines a 'group of companies' as:

> *'a parent undertaking and all its subsidiary undertakings*'.

A 'parent undertaking' in turn is defined as:

> '*an undertaking which controls, either directly or indirectly, one or more subsidiary undertakings. An undertaking which prepares consolidated financial statements in accordance with Directive 2013/34/EU of the European Parliament and of the Council shall be deemed to be a parent undertaking*'.

The rather detailed rules for groups of companies, most of them speaking for themselves, take the form of a whole new Chapter in the Regulation, dealing with what the Regulation calls on the one hand 'cooperation and communication', and on the other hand 'coordination'. Each of these apply to both courts and insolvency practitioners.

Of note is also that the EIR 2015 strengthens cooperation and communication between insolvency practitioners and courts in the event of one single company (in that case coordination between main and secondary proceedings being the obvious aim).

5.2 Cooperation and Communication for Groups of Companies

As far as cooperation and communication is concerned, the proof of the Group of Companies chapter will lie in both the goodwill and the procedural limits to which courts and practitioners in the Member States are subject. The Chapter in relevant part talks of standing of the insolvency practitioners in each other's proceedings, of exchange of information, of the option to conclude agreements to all these effects, etc. However each of these possibilities (! with the exception of group coordination proceedings: see below) is qualified by reference to both national procedural law, to conflict of interest, and to the sound administration of justice. In other words there are likely to be plenty of remaining options for recalcitrant jurisdictions to refuse to co-operate. In fairness, in many such group proceedings practitioners and courts currently already explore co-operation. The clear instructions to that effect in the Regulation undoubtedly will assist in stretching current procedural options in the Member States to assist further cooperation.

5.3 Group Coordination Proceedings

The one innovation backed up by hard law provisions in the Regulation, is the introduction of 'group coordination proceedings'.

As noted, it was the European Parliament which suggested these proceedings. Parliament had also suggested to assign group coordination to the jurisdiction of COMI of the member of the group which performs 'crucial functions'. Parliament's proposed amendment on this issue read:[44]

> *Opening of group coordination proceedings*
> 1. *Group coordination proceedings may be brought by an insolvency representative in any court having jurisdiction over the insolvency proceedings of a member of the group, provided that:*
>   a) *insolvency proceedings with respect to that member of the group are pending; and*
>   b) *the members of the group having their centre of main interests in the Member State of the court seised to open the group coordination proceedings perform crucial functions within the group.*
> 2. *Where more than one court is seised to open group coordination proceedings, the group coordination proceedings shall be opened in the Member State where the most crucial functions within the group are performed. To that extent the courts seised shall communicate and cooperate with each other in accordance with Article 42b. Where the most crucial functions cannot be determined, the first court seised may open group coordination proceedings provided that the conditions for opening such proceedings are satisfied.*
> 3. *Where group coordination proceedings have been opened, the right of insolvency representatives to request a stay of the proceedings in accordance with point (b) of Article 42d(1) shall be subject to the approval of the coordinator. Existing stays shall remain in force and effect, subject to the coordinator's power to request the cessation of any such stay.*

'Crucial functions within the group' in turn were defined as:

> *(i) the ability, prior to the opening of insolvency proceedings with respect to any member of the group, to take and enforce decisions of strategic relevance for the group or parts of it; or*
> *(ii) the economic significance within the group, which shall be presumed if the group member or members contribute at least 10 per cent to the consolidated balance-sheet total and consolidated turnover.*

It is clear that the 'crucial functions' criterion was likely to drag the EP's innovation into practical controversy. Consequently Council (and Commission) supported the idea of group coordination proceedings, bar the 'crucial functions' jurisdictional trig-

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[44] EP legislative resolution of 5 February 2014, P7_TA(2014) 0093.

ger. In the absence of choice of court, Article 62 now instead has a strict *lis alibi pendens* rule:

> '*Without prejudice to Article 66, where the opening of group coordination proceedings is requested before courts of different Member States, any court other than the court first seised shall decline jurisdiction in favour of that court*.'

Combined with Article 61's rule that such proceedings may be requested before any court having jurisdiction over the insolvency proceedings of a member of the group, inevitably Article 62 will trigger race to court for the establishment of the group coordination proceedings. However this was seen as preferable to the difficult determination of 'crucial functions'.

Article 63 obliges the court seized to check the request to open group coordination proceedings against the following criteria:

> *(a) the opening of such proceedings is appropriate to facilitate the effective administration of the insolvency proceedings relating to the different group members*
> *(b) no creditor of any group member expected to participate in the proceedings is likely to be financially disadvantaged by the inclusion of that member in such proceedings; and*
> *(c) the proposed coordinator fulfils the requirements laid down in Article 71.*

Article 71 in turn insists among others that the coordinator cannot be chosen from among the midst of the insolvency practitioners involved in each of the members of the group's insolvency.

Among these criteria, the proviso that '*no creditor of any group member expected to participate in the proceedings is likely to be financially disadvantaged by the inclusion of that member in such proceedings*' is likely to be the toughest to apply. It presumably requires an overall assessment of the net return after insolvency, rather than just an assessment in absolute terms. However how exactly 'competing' insolvency regimes (for jurisdiction to a large degree also leads to applicable law) are to be compared in this assessment is not clear at all.

It is only after being satisfied that Article 63's criteria are met, that the court seized gives notice of the request to all other insolvency practitioners of the group. The court seized has to give all insolvency practitioners involved the opportunity to be heard. Article 63 does not state so in so many words however presumably after having heard the practitioners concerned, the court has to revisit its assessment of Article 63's criteria.

The reference in Article 62 to Article 66, is to that Article's choice of court provisions:

> *'1. Where at least two-thirds of all insolvency practitioners appointed in insolvency proceedings of the members of the group have agreed that a court of another Member State having jurisdiction is the most appropriate court*

for the opening of group coordination proceedings, that court shall have exclusive jurisdiction.

2. The choice of court shall be made by joint agreement in writing or evidenced in writing. It may be made until such time as group coordination proceedings have been opened in accordance with Article 68.

3. Any court other than the court seised under paragraph 1 shall decline jurisdiction in favour of that court.

4. The request for the opening of group coordination proceedings shall be submitted to the court agreed in accordance with Article 61.'

Article 66's two thirds majority rule applies therefore even if one of the objecting insolvency practitioners has won the race to court. It avoids the proceedings being hijacked by a minority. This effectively amounts to cram-down of choice of court for group coordination proceedings.

Interestingly, Article 66 does not mention the need for the choice of court to have to abide by the aforementioned criteria of Article 63. This gives the 2/3 majority of insolvency practitioners a much wider remit to select the exclusive jurisdiction.

Finally, it is worth mentioning that the exclusive jurisdiction provision in this title applies to group coordination proceedings only. The underlying jurisdiction for main or secondary proceedings is not affected. If and when a group coordinator is assigned, the EIR assigns him or her overall co-ordination and planning tasks (Article 72) as well as a wide remit to request information, to be heard, and to provide input into all national proceedings.

6. Secondary Insolvency Proceedings

Local insolvency proceedings following the activities of a debtor in that locality, but with COMI elsewhere, continue to be treated with caution in the EIR. Their inclusion at all in the Regulation upsets the universality of the proceedings in the Member State of COMI. On the other hand they clearly can be of use in assisting with the main proceedings, especially in the realisation of local assets (this would be more challenging to organise entirely from the Member State of COMI). Moreover they protect creditors in Member States other than that of COMI in the event the laws of that Member State do not (yet) allow for opening of the proceedings.

In an attempt to limit the impact on universality, the former EIR attached different conditions to local proceedings depending on whether proceedings in the Member State of COMI had already been opened. If no such opening had occurred, then the local proceeding, aimed at the assets located in that territory, is referred to as a 'territorial' insolvency proceeding. From the moment proceedings are opened in the Member State of COMI, any 'territorial' proceedings are renamed 'secondary proceedings'. Precisely because they are also required in the event the laws of the Member State of COMI do not allow for opening of proceedings, local creditors deserve the protection of local insolvency proceedings: these territorial proceedings therefore

can be both winding-up and restructuring proceedings. The former EIR, however, prescribed that secondary proceedings, by contrast, always had to be winding-up proceedings: see in this respect very clearly Article 3(3) in fine: '*These latter proceedings must be winding-up proceedings*'.

I found the philosophy behind this never quite satisfactorily explained, in spite of valiant effort in scholarship.[45] The net result, I would suggest, is that a restructuring effort in the Member State of COMI may quite effectively be undermined. At the very least the negotiation position of relevant parties is seriously strengthened, by creditors' insistence, indeed threat that they will open secondary proceedings. Such move effectively lifts the assets in that Member State from the restructuring effort. (Although the courts in the secondary State may be able to apply local conditions for winding-up in a way which does not jeopardise such co-ordination).

It is this negative impact on the proper restructuring effort in the Member State of COMI, which has now led to the EIR 2015 dropping the condition that secondary proceedings must be winding-up proceedings. The aforementioned sentence no longer features in the EIR 2015.

The EIR 2015 has also amended the definition of 'establishment' (only those Member States where the debtor has an establishment may open secondary proceedings). The former EIR defined it as '*any place of operations where the debtor carries out a non-transitory economic activity with human means and goods*'. The Court of Justice has specified this somewhat more practically in *Interedil* as[46] '*a structure with a minimum level of organisation and a degree of stability for the purpose of pursuing an economic activity'*, basically a combination of pursuit of an economic activity and the presence of human resources. This has to be determined in the same way as the location of the centre of main interests, namely on the basis of objective factors which are ascertainable by third parties.[47]

A good illustration is *Olympic Airways*,[48] in which the Court of Appeal for England and Wales combined *Interedil* and further CJEU guidance with respect to COMI, as well as extensive reference to the Virgos Schmit Report, to hold that the Regulation's definition of "establishment" a meaning which requires more to its "economic activity" than the mere process of winding-up. In the words of Sir Bernard Rix (at 33) '*The definition is clearly intended to lay down a rule that the mere presence of an office or branch, a "place" at which the debtor is located, is not sufficient. It has to be a place "of operations": human and physical resources have to be involved in those operations; and there has to be "economic activity" involving those resources.*' He also emphasised that this economic activity needs to be 'external', i.e. market oriented. Of note is also the temporal element: per *Office Metro*[49] the possibility to open

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[45] See G Moss, I.F Fletcher and S Isaacs (eds.), n 3 above, p 51; and M Virgos and F Garcimartin, *The European Insolvency Regulation: Law and Practice*, 157–158 (The Hague, Kluwer, 2004).

[46] Case C-396/09 *Interedil*, [2011] ECR I-9915, para. 62.

[47] *Ibid.*, para. 63.

[48] [2013] EWCA Civ 643.

[49] [2012] EWHC 1191 (Ch).

up secondary proceedings requires there to be such establishment at the time of the request for opening of such proceeding. The UK Supreme Court later confirmed.[50]

The EIR 2015 now defines 'establishment' as '*any place of operations where a debtor carries out or has carried out in the 3-month period prior to the request to open main insolvency proceedings a non-transitory economic activity with human means and assets'*. 'Assets' replaces 'goods', which is quite helpful especially in a services economy. Moreover the 3-month period is another way in which the Regulation discourages forum shopping.

7. Other Provisions

Of particular practical note are the provisions in the EIR 2015 dealing with the interconnection of insolvency registers (Article 25). The need for this has repeatedly been highlighted.[51] Specifically, it is almost impossible to require bona fide parties (banks in particular) not to carry out transactions which have a negative impact on the collective creditors affected by the insolvency, lest these third parties dispose of a means to verify their counterparty's insolvent status. The EC is to adopt the necessary implementing regulation to enable the interconnection, which will be materialised inter alia via the EU's E-Justice portal. Data protection is one of the concerns which need to be addressed in the roll-out of the register.

8. Applicability in Time

As noted, the EIR 2015 will apply to insolvency proceedings opened after 26 June 2017 (Article 84 and Article 92). 'Opened' requires formal opening by a Member State's judicial authorities, within the meaning of Article 2(7) EIR 2015. It does not refer to the date of a request to open those proceedings.[52]

The former EIR has been repealed from 25 June 2015 (see Article 92 with respect to entry into force) however in accordance with Article 84(2) it shall continue to apply to insolvency proceedings which have been opened before 26 June 2017 (and provided of course these proceedings are within the scope of the former, not the new, EIR).

Article 84 (1), second sentence (which existed as Article 43, second sentence), solves the conflit mobile[53] which might arise as a result of the interim period between

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[50] *The Trustees of the Olympic Airlines Sa Pension and Life Assurance Scheme v. Olympic Airways* SA, [2015] UKSC 27.

[51] For instance in the circumstances of Case C-251/12 *van Buggenhout/van de Mierop,* ECLI:EU:*C*:2013:566, and G van Calster, '*van Buggenhout /van de Mierop*: ECJ disagrees with its AG re protection of debtors', <http://www.gavclaw.com>, 20 September 2013, last consulted 28 July 2015.

[52] Case C-1/04 *Susanne Staubitz-Schreiber*, [2006] ECR I-701 (re Art. 43 of the former EIR).

[53] A conflit mobile in the narrow sense occurs when the factual matrix included in the connecting factor changes. A classic example would be a change in nationality (a relevant connecting factor in much

acts committed by a debtor (classic example: contracts entered into), and that debtor subsequently being the subject of an insolvency proceeding. If that proceeding is opened after 26 June 2017, the acts committed by a debtor before that date shall continue to be governed by the law which was applicable to them at the time they were committed. The EIR 2015 then covers all other, procedural aspects of the insolvency.

The rather quick succession of two insolvency regimes (2000 and 2014) means in practice that quite a few insolvencies which procedurally might be subject to the EIR 2015, involve 'acts committed by a debtor' stretching back to before the entry into force of the former EIR. Article 84's (and before it: Article 43's) intention may be simple, namely to prevent retroactive application of the applicable conflict of law rules.[54] However in practice the split between applicable law and applicable procedure in my view may[55] create more practical complication than it solves.

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of family law) or a change in contractual terms (e.g. parties amend the agreed place of delivery). In the context of the current article I propose to apply it to a change in the conflict of laws rule.

[54] See M Virgos and F Garcimartin, n 45 above, p 31–32.

[55] Discussion in scholarship is vague to non-existent, and in case-law the issue would not seem to have featured abundantly.